

Journal of Air Law and Commerce

Volume 42 | Issue 2

Article 8

1976

Lessor Liability in Aircraft Rental

R. Brent Cooper

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

R. Brent Cooper, *Lessor Liability in Aircraft Rental*, 42 J. AIR L. & COM. 447 (1976)
<https://scholar.smu.edu/jalc/vol42/iss2/8>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

LESSOR LIABILITY IN AIRCRAFT RENTAL

R. BRENT COOPER

In recent years there has been a marked increase in the number of individuals using private aircraft as a primary or secondary source of transportation. The fleet of general aviation aircraft now numbers over 150,000.¹ Some who possess pilot's licenses have found the cost of purchasing and maintaining a private aircraft prohibitive, opening the door to entrepreneurs who perceive a sizable potential market in the leasing of small general aircraft. The leasing concept has been very successful with motor vehicles, and this success seems to be spreading to aircraft leasing.

One problem for lessors of motor vehicles that is also facing the lessors of private aircraft is legal responsibility for the negligent acts of the lessee or renter. With increasing numbers of individuals obtaining licenses, the number of aviation accidents has increased.² Beyond the actual accident damage untold time and money is used to prosecute cases to recover damages or procure settlements.

Since many pilots rent aircraft because they cannot afford the cost associated with purchase and maintenance, they are in no position to respond financially to the damage done as a result of their negligence. For this reason there have been increased efforts to hold the lessor of the aircraft liable for the negligence of the lessee-pilot. The attempts by the legislatures and the courts will be examined along with their positive and negative attributes. Additionally, new methods of creating the same effect as vicarious liability will be compared to the statutes imposing vicarious liability per se.

HISTORY OF VICARIOUS LIABILITY

The doctrine of vicarious liability originated with master-servant liability in cases when third parties were trying to hold employers

¹ National Transportation Safety Board, Annual Report to Congress, 7 (1974). "General aviation aircraft" is defined as all nonairline flying aircraft.

² *Id.* at 41. There were 4,362 general aviation accidents resulting in 1,290 fatalities during 1974.

liable for the negligent acts of their employees.³ The exact rationale for the creation of the doctrine is the subject of debate. In ancient law the owner was responsible for the torts of his servants, wives and slaves.⁴ One court attributed the creation of the doctrine to the fact that "by employing him, I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it."⁵ Others believed the doctrine was based on the fact that "there ought to be a remedy against some person capable of paying damages to those injured"⁶ or that if the master were made responsible for the acts of his servants, he would exercise a greater degree of care in selecting them.⁷ According to one learned judge, liability arises from our failure to do our own work. This failure is permitted by an indulgent law on the condition that we bear absolute responsibility for those who accomplish our work for us.⁸ Another supported the principle of natural justice, reasoning that when one of two innocent persons must suffer through the fraud of a third, the suffering should be borne by the master who, by employing the third party, caused the fraud to be committed.⁹ Perhaps, however, the most accurate account is given by Baty. He stated that "[i]n hard fact, the reason for the employers' liability is the damages are taken from a deep pocket."¹⁰ In the search for a solvent defendant the courts have turned to the one with the greatest ability to pay.¹¹

The doctrine of vicarious liability has undergone gradual expansion in the search for solvent defendants. Many jurisdictions

³ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 69 (4th ed. 1971). [hereinafter cited as PROSSER]

⁴ *Id.*

⁵ *Duncan v. Finlater*, 6 Cl. & F. 894, 910 (1839).

⁶ *Limpus v. General Omnibus Co.*, 1 H. & C. 526 (1867).

⁷ POTHIER, *OBLIGATIONS* (2d Am. ed. trans. Evans) p. 72.

⁸ ABRIDGEMENT (7th ed. 1832), p. 336.

⁹ *Hern v. Nichols*, 1 Salk. 289 (1709).

¹⁰ BATY, *VICARIOUS LIABILITY*, 154 (1916). For other discussions of vicarious liability, see James, *Vicarious Liability*, 28 *TULANE L. REV.* 161 (1954); Douglas, *Vicarious Liability and Administration of Risk*, 38 *YALE L.J.* 584 (1929); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 *HARV. L. REV.* 315 (1894).

¹¹ *Adler's Quality Bakery, Inc. v. Gaseteria, Inc.*, 32 N.J. 55, 159 A.2d 97 (1960).

now hold a master liable for the intentional torts of his servants.¹² The doctrine of vicarious liability also has been applied to a number of joint enterprises.¹³ Each member of the joint enterprise is considered an agent and servant of the others and is vicariously liable for the acts of all.¹⁴

At common law the general rule was that a bailor was not responsible for the negligent acts of his bailee.¹⁵ This rule was applicable whether the bailment was for hire or was gratuitous.¹⁶ The courts thought the bailor-bailee relationship was not akin to that of master-servant and refused to extend the doctrine of vicarious liability to bailments.¹⁷ Many courts deemed it unjust to hold a bailor liable for the acts of the bailee over whom the bailor has no control.¹⁸ This does not mean, however, that a bailor is ab-

¹² *Limpus v. London General Omnibus Co.*, 1 H. & C. 526 (1867); *Cohen v. Dry Dock E. B. & B. R. Co.*, 69 N.Y. 170 (1877); *Howe v. Newmarch*, 12 Allen, Mass. 49 (1866); *Osipoff v. City of New York*, 286 N.Y. 422, 36 N.E.2d 646 (1941).

¹³ *Howard v. Zimmerman*, 120 Kan. 77, 242 P. 131 (1926); *Kokesh v. Price*, 136 Minn. 304, 161 N.W. 715 (1917); *Connelllee v. Nees*, 266 S.W. 502 (Tex. Com. App. 1926).

¹⁴ See note 13 *supra*.

¹⁵ *Williams v. Younghusband*, 57 F.2d 139 (5th Cir. 1932); *Baugh v. Rogers*, 24 Cal. 2d 200, 148 P.2d 633 (1944); *Saunders System Birmingham Co. v. Adams*, 217 Ala. 621, 117 So. 72 (1928); *Mullally v. Carvill*, 356 S.W.2d 238 (Ark. 1962); *Smith v. Callahan*, 34 De. 129, 144 A. 46 (1928); *Engleman v. Traeger*, 102 Fla. 756, 136 So. 527 (1931); *Rockford v. Nolan*, 316 Ill. 60, 146 N.E. 564 (1925); *Fisher v. Fletcher*, 191 Ind. 529, 133 N.E. 834 (1922); *Robinson v. Bruce Rent-A-Ford Co.*, 205 Iowa 261, 215 N.W. 724 (1927); *Halverson v. Blosser*, 101 Kan. 683, 168 P. 863 (1917); *Blair v. Boggs*, 265 S.W.2d 795 (Ky. 1954); *York v. Days, Inc.*, 153 Me. 441, 140 A.2d 730 (1958); *Hartley v. Miller*, 165 Mich. 115, 130 N.W. 336 (1911); *Fjellman v. Weller*, 213 Minn. 457, 7 N.W.2d 521 (1942); *McQueen v. Ingalls Shipbuilding Corp.*, 229 Miss. 650, 91 So. 2d 740 (1957); *Sweat v. Brozman*, 239 Mo. App. 1048, 198 S.W.2d 531 (1947); *Mimick v. Beatrice Foods Co.*, 167 Neb. 470, 93 N.W.2d 627 (1958); *Paul v. Benavidez*, 56 N.M. 328, 243 P.2d 1018 (1952); *Ford v. McCue*, 163 Ohio St. 498, 127 N.E.2d 209 (1955); *Orose v. Hodge Drive-It-Yourself Co.*, 132 Ohio St. 607, 9 N.E.2d 671 (1955); *Kantola v. Lovell Auto Co.*, 157 Or. 534, 72 P.2d 61 (1937); *McColligan v. Pennsylvania R. Co.*, 214 Pa. 229, 63 A. 792 (1906); *Smith v. Domina*, 54 R.I. 96, 170 A. 90 (1934); *Gathwright v. Carl Markley Motor Co.*, 146 S.W.2d 307 (Tex. Civ. App.—Beaumont 1940, *no writ*); *Young v. Lamson*, 121 Vt. 474, 160 A.2d 873 (1960); *Green v. Smith*, 146 Va. 442, 131 S.E. 846 (1926); *Hammerbeck v. Hubbard*, 42 Wash. 2d 204, 254 P.2d 479 (1953); *Ritter v. Hicks*, 102 W. Va. 541, 135 S.E. 601 (1926).

¹⁶ *Dean v. Ketter*, 328 Ill. App. 206, 65 N.E.2d 572 (1946); *McQueen v. Ingalls Shipbuilding Corp.*, 229 Miss. 650, 91 So. 2d 740 (1957).

¹⁷ *Siegrist Bakery Co. v. Smith*, 162 Tenn. 253, 36 S.W.2d 80 (1931).

¹⁸ *Id.*

solved from his own negligence. If the bailor knows the bailee to be incompetent, reckless or otherwise unfit to assume the responsibility created by the bailment, the courts impose liability for endangering the safety of the general public by entrusting such a person with the responsibility created by the bailment.¹⁹ A bailor was also held to be liable for injuries resulting from defects in the bailed property.²⁰ Just as public policy would demand that a manufacturer refrain from introducing defective products into the stream of commerce, so also is a bailor required to take care before granting a bailment.²¹

In certain classes of bailments the common law rule denying the extension of vicarious liability has been superseded by statute.²² Most of these statutes concern the renting of motor vehicles and aircraft. The wide acceptance by the American public of the idea of leasing as an alternative to purchasing has created a substantial potential market for those seeking to enter this area. Logically, the more motor vehicles and aircraft leased, the greater the probability that more of these will be involved in an accident. The legislatures of the states have seen a need to expand the remedies available to the injured party.²³ The courts, however, have expressed reluctance to expand this liability in the absence of a statute. In these few instances when the courts *sua sponte* have imposed vicarious liability, many have used fiction and superimposed the relationship of principal and agent over that of bailor and bailee.²⁴ On the other hand, some courts willingly impose vicarious liability as a matter of public policy.²⁵ The need for legislative and judicial intervention is evident, and an increasing number of legislatures and courts have responded to the need.²⁶

¹⁹ *Saunders v. Prue*, 235 Mo. App. 1245, 151 S.W.2d 478 (1941).

²⁰ *Alexander v. Check*, 241 S.W.2d 950 (Tex. Civ. App.—Eastland 1951, writ *ref'd n.r.e.*).

²¹ *Id.*

²² See discussion *infra* notes 37-98.

²³ *Id.*

²⁴ *Robinson v. Bruce Rent-A-Ford Co.*, 205 Iowa 261, 215 N.W. 724 (1927).

²⁵ *Hays v. Morgan*, 221 F.2d 481 (5th Cir. 1955).

²⁶ See discussion *infra* notes 37-98 and 115-31.

VICARIOUS LIABILITY IN THE FIELD OF AVIATION

I. *Common Law*

The traditional rule has been that a bailor is not liable for the negligent acts of his bailee in the absence of a specific statute.²⁷ This is also the generally accepted rule today for bailments of aircraft. In the absence of a statute providing a remedy, most injured plaintiffs are precluded from asserting a claim against the bailor whose bailee's negligence resulted in their injury.²⁸

A popular theory employed by the courts during the infancy of aviation to extend liability to the owners of the aircraft for damages done by the aircraft was that aviation was an ultrahazardous activity. The first *Restatement of Torts* stated in 1938 that:

Aviation in its present stage of development is ultrahazardous because even the best constructed and maintained aeroplane is so incapable of complete control that the flying creates a risk that the plane even though carefully constructed, maintained and operated, may crash to the injury of persons, structures and chattels on the land over which flight is made.²⁹

The ultrahazardous activity theory has been abandoned by most courts³⁰ because the aviation industry has advanced over the years to such a stage that, given proper construction, maintenance and control, the aircraft *can* be operated with minimal probability of injury to others. As a result, most courts have tended to view the operation of aircraft as they would an ordinary activity, such as driving an automobile, and have fixed the standard of care at that of a reasonable man.³¹

Florida still clings to the vestiges of the old ultra-hazardous

²⁷ See note 15 *supra*.

²⁸ But see *Allegheny Airlines, Inc. v. United States*, 504 F.2d 104 (7th Cir. 1974); Note, 41 J. AIR L. & COM. 511 (1975).

²⁹ RESTATEMENT OF TORTS § 520 (1938), *comment b*. The theory of extra-hazardous activity set forth above was conceived in the decision of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), when the court applied absolute liability to the owner of land for water escaping from a man-made lake.

³⁰ *United States v. Praylou*, 208 F.2d 291, 293 (4th Cir. 1953); *cert. denied*, 347 U.S. 934 (1954); *D'Anna v. United States*, 181 F.2d 335, 337 (4th Cir. 1950); *Margosian v. United States Airlines, Inc.*, 127 F. Supp. 464, 467 (E.D.N.Y. 1955); *Prentiss v. National Airlines, Inc.*, 112 F. Supp. 306, 316 (D.N.J. 1953); *Adler's Quality Bakery, Inc. v. Gaseteria, Inc.*, 32 N.J. 55, 159 A.2d 97 (1960); Note, 41 J. AIR L. & COM. 511 (1975).

³¹ See note 30 *supra*.

activity theory. The Fifth Circuit in *Grain Dealers National Mutual Fire Insurance Company v. Harrison*,³² made an *Erie*,³³ prognostication and held that the Florida courts, if faced with the issue, would hold that an airplane was a "dangerous agency when in operation and the owner should be absolutely liable for the acts and omissions of the pilot."³⁴

The future of the doctrine of ultrahazardous activity as a non-statutory modification of the common law rule denying the application of vicarious liability to the lessor-renter situation is uncertain. But it is quite evident that the prevailing rule in the absence of a statute is that a plaintiff cannot recover damages from the owner of an airplane whose bailee's negligence resulted in injuries to the plaintiff.³⁵

II. Statutory Liability

Roughly one-half of the states have some form of statute imposing liability on the owner of an aircraft for damages caused by the renter's operation of the aircraft.³⁶ The statutes will be examined and compared in an effort to expose their deficiencies and to obtain a more favorable solution. These statutes can be classified into five categories:

- A. Statutes providing proof of injury is prima facie evidence of negligence;
- B. 1) Statutes conferring absolute liability for damage to persons and property on the ground;
2) Statutes conferring absolute liability for damage to persons

³² *Grain Dealers National Mutual Fire Insurance Co. v. Harrison*, 190 F.2d 726 (5th Cir. 1951). See *Orefice v. Albert*, 237 So. 2d 142 (Fla. 1970).

³³ The Supreme Court in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) held that there was no federal general common law and a federal court sitting under diversity jurisdiction must apply the common law of the state in which it is sitting. If, however, the state courts in the state where the federal court is sitting have not ruled on the issue in question, the federal district court is required to put itself in the place of the state court where it is sitting and decide the issue as it believes the state court would have decided it.

³⁴ See note 32 *supra*.

³⁵ See discussion, *supra* notes 15-26.

³⁶ Alabama, Arkansas, Connecticut, California, Delaware, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, and Wyoming.

and property on the ground, but specifically excluding lessors from the coverage of the statute;

- C. Statutes conferring absolute liability;
- D. Statutes holding the owner-lessor vicariously liable for all negligent acts of the lessee;
- E. Definitional Statutes.

A. *Statutes Providing Proof of Injury as Prima Facie Evidence of Negligence*

Rather than confer absolute liability on the owner of the aircraft for damages inflicted by the negligence of the renter, a number of states merely create a presumption of negligence upon the showing of injury by the plaintiff.³⁷ Most specifically mention the situation in which the aircraft is leased and also provide that if the aircraft is leased at the time of injury to person or property, both the owner and lessee shall be prima facie liable and may be sued jointly or separately.³⁸

A close examination of this type of statute will reveal marked deficiencies. First, the coverage of the statute extends to injuries to persons or property on land or water.³⁹ The guest or passenger in an aircraft operated by a negligent renter is not entitled to recover. It appears that the greater potential for injury lies with the aircraft passenger. (Though the aircraft passenger would seem to be in more of a position to evaluate the capabilities of the pilot before embarking on an excursion whereas the plaintiff situated on the ground would in most instances have no prior contact with the pilot.) Another limitation of this statute is that absolute liability is *not* imposed on the owner.⁴⁰ After the plaintiff has proved his injuries proximately resulted from an act of the owner's renter, both the owner and the renter are prima facie liable.⁴¹ The owner and lessee are permitted to rebut the presumption of liability by a showing that the owner was free from negligence.⁴²

The operation of this type of statute may be summarized in two

³⁷ MD. ANN. CODE, art. 1A, § 3-304 (1957); NEV. REV. STAT. § 493.060 (1973); R.I. GEN. LAWS, § 1-4-3 (1956); WIS. STAT. ANN. § 114.05 (1974).

³⁸ See, e.g., NEV. REV. STAT. § 493.060(2) (1973).

³⁹ *Id.* at § 493.060(1).

⁴⁰ *Id.*

⁴¹ *Id.* at § 493.060(3).

⁴² *Id.*

statements: 1) the liability is not absolute—there still must be some negligence on the part of the owner or lessee; and 2) if the lessee was negligent in the operation of the leased aircraft which proximately resulted in the plaintiff's injuries, then the lessor-owner may be vicariously liable.

B. Statutes Conferring Absolute Liability on the Owner of an Aircraft for Damage to Persons and Property

Other statutes confer absolute liability on the owner of an aircraft for damages to persons and property. The coverage, however, is not identical in all of these statutes. In some instances, the lessor is considered an owner for the purpose of the statute. The statutes state that if the aircraft is leased at the time of the injury to persons or property, both the owner and lessee shall be liable.⁴³ The scope and operation of the statutes under this section are quite similar to those in Section A. The scope of coverage is limited to "injuries to persons or property on the land or water."⁴⁴ Like the scope of those statutes discussed in Section A, passengers and guests of the lessee-pilot are excluded from coverage of these statutes.⁴⁵ Unlike the statutes in Section A, however, more than a mere presumption of liability is created. The owner under these statutes is absolutely liable.⁴⁶ The plaintiff need not show any negligent acts or omissions on the part of the operator, only that the plaintiff has suffered injuries proximately resulting from the operation of the aircraft rented by the owner.⁴⁷

Other statutes under this category exclude the lessor-owner from the operation of the statute⁴⁸ by providing that the term "owner" shall include a person having full title to aircraft and operating it

⁴³ N.J. REV. STAT. ANN. § 6:2-7 (1973); DEL. CODE ANN. tit. 2 § 305 (1975); N.D. CENTURY CODE § 2-03-05 (1975); S.C. CODE § 2-6 (1962); VT. STAT. ANN. tit. 5, § 224 (1972).

⁴⁴ See, e.g., N.J. REV. STAT. ANN. § 6:2-7 (1973).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Adler's Quality Bakery, Inc. v. Gaseteria, Inc.*, 32 N.J. 55, 159 A.2d 97 (1960). Here the court stated that one reason for imposing absolute liability on an owner of an aircraft is that he is the better risk bearer. The court further found there was a valid legislative purpose and the classification adopted to achieve such purpose was entirely reasonable and not repugnant to the equal protection clause of the 14th Amendment.

⁴⁸ ARK. STAT. § 74-110 (1947); PA. REV. CIV. STAT. tit. 2, § 1469 (Purdon 1963); S. D. COMPILED LAWS § 50-13-6 (1967); TENN. CODE ANN. § 42-105 (1964).

through servants, and shall also include a bona fide lessee of such aircraft, whether gratuitously or for hire, but shall not include a bona fide bailor or lessor of such aircraft.⁴⁹ The case law on this exclusionary clause is almost nonexistent. Apparently the reason for excluding lessors from the liability imposed by these statutes is the extinguishment of control over the aircraft when the lease is effected. The courts in the past have stated that one should not be held responsible for the results he cannot control.⁵⁰

C. *Statute Conferring Absolute Liability*

Currently, only one state has a statute making the owner of an aircraft absolutely liable for the damages resulting from its operation.⁵¹ Unlike the statutes discussed in Sections A and B, this statute includes all injured parties, not just those fortunate enough to be injured on the ground. The plaintiff need only show that his injuries resulted from the actions of the defendant; no showing that the lessor-owner or lessee-pilot was guilty of a negligent act or omission is required.

This statute represents broader coverage of all plaintiffs and defendants than the statutes previously discussed. It does have a limitation in its application to the lessor-lessee situation. The third paragraph of the statute states that:

Subdivision one of this section shall not apply where the permission to use or operate the aircraft is the permission of a lessor, expressed or implied, in a bona fide lease of the aircraft for a period of thirty days or more.⁵²

Since this limitation would eliminate coverage for aircraft leases for periods greater than thirty days, potentially a large segment of the leasing market may be excluded. The plaintiff seeking a direct route to the deep pockets may suddenly be detoured by the limitation imposed by the statute.

D. *Statutes Holding the Owner-Lessor Vicariously Liable for All Negligent Acts of His Lessee*

Perhaps the purest form of vicarious liability is represented by

⁴⁹ See, e.g., PA. REV. CIV. STAT. tit. 2, § 1469 (Purdon 1963).

⁵⁰ *McQueen v. Ingalls Shipbuilding Corp.*, 229 Miss. 650, 91 So. 2d 740 (1957).

⁵¹ N.Y. GEN. BUS. LAW § 251(1) (McKinney 1968).

⁵² *Id.* at § 251(3). See *Byrne v. Sloan*, 317 N.Y.S. 719 (App. Div. N.Y. 1971).

the statutes under section D.⁵³ For example, the California statute provides that:

Every owner of an aircraft is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the aircraft, in the business of the owner or otherwise, by any person using the same with permission, express or implied, of the owner.⁵⁴

First, the statutes provide that liability is not absolute because the plaintiff must show a negligent act or omission in the operation of the aircraft. Secondly, coverage is not limited to injuries to persons or property on the land or water. Under this section a passenger would have a cause of action. Lastly, there is no "out" for the lessor-owner as provided by some statutes. The coverage extends to all owners. Of all the statutes discussed these would appear to offer the broadest coverage and provide the greatest opportunity for a plaintiff injured by the negligent acts of a lessee to proceed against the owner of the aircraft.

E. *Definitional Statutes*

Creative attorneys have repeatedly attempted to impose vicarious liability on the owners-lessors of aircraft through the use of definitional statutes of the federal and various state governments. The language relied on is found in the Federal Aviation Act⁵⁵ as well as in many state statutes.⁵⁶ Attempts to impose vicarious liability

⁵³ CAL. PUB. UTIL. CODE § 21404 (1965), *as amended*, (Supp. 1976); MICH. COMPILED LAWS ANN. § 259.180a (1967).

⁵⁴ CAL. PUB. UTIL. CODE § 21404 (1965), *as amended*, (Supp. 1976).

⁵⁵ Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* 1970, formerly Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 [hereinafter referred to as "the Act"]. 49 U.S.C. § 1301(26).

⁵⁶ ALA. CODE tit. 4, § 20(25) (1960); CONN. REV. GEN. STAT. § 15-34(20) (1975); DEL. CODE ANN. tit. 2, § 501 (1975); IOWA CODE ANN. § 328.1(14) (1949); ILL. REV. STAT. ANN. ch. 15½, §§ 22.11, 22.42a-22.42o (1963); IND. STAT. ANN. § 8-21-3-1(h) (Burns 1973); KY. REV. STAT. ANN. § 183.011(16) (1971); MASS. LAWS ANN. ch. 90, § 35(j), 49B-49R (1975); ME. REV. STAT. ANN. tit. 6, § 3(24) (1964); MICH. COMPILED LAWS § 259.22 (1967); MINN. STAT. ANN. § 360.013(10) (1966); MISS. CODE ANN. § 61-1-3(j) (1973); MONT. REV. CODES ANN. § 1-1-0(10), *as amended*, (Supp. 1975); NEB. REV. STAT. § 3-101(11) (1974); N.H. REV. STAT. ANN. § 422:3(23) (1968); N.C. GEN. STAT. § 63-1(16) (1975); N.Y. GEN. BUS. LAW § 251(2) (McKinney 1968); VT. STAT. ANN. tit. 5, § 2(20) (1972).

have been brought under both the federal and state statutes.⁵⁷ The federal statute provides that:

"Operation of aircraft" or "Operate aircraft" means the use of aircraft, for the purpose of air navigation, and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.⁵⁸

In the past the use of these statutes resulted in some success. The current trend, however, appears to be away from construing the statutes as providing a cause of action.⁵⁹ Of all the cases finding liability under the definitional statutes, three stand out.

Hoebee v. Howe,⁶⁰ the first major case interpreting a definitional statute to create a cause of action against the owner of a leased airplane, concerned a suit by a plaintiff who was thrown from his horse when it was frightened by a low flying aircraft operated by a lessee and owned by the defendant. The trial court found the defendant owner-lessor liable, and the Supreme Court of New Hampshire affirmed. In support of its holding the court stated that the legislature clearly intended to place financial responsibility on the owner of the conduct of the lessee even though the owner was not in control.⁶¹ The court found the language of the statute to be "unequivocal and without qualification expressed or reasonably to be implied."⁶²

The court further relied on *House Report No. 2091*⁶³ which recommended passage of a bill that would relieve certain security holders from liability under the act. The court interpreted this report as an effort by the Congress to define which persons were not covered by the Act. Since lessors were not excluded, it was intended that they be included.⁶⁴ The owner of the airplane was

⁵⁷ See notes 60-98 *infra* and accompanying text.

⁵⁸ See note 55 *supra*. The language in the state statutes is substantially the same.

⁵⁹ See notes 101-03 *infra* and accompanying text.

⁶⁰ 98 N.H. 168, 97 A.2d 223 (1953).

⁶¹ *Id.* at 225.

⁶² *Id.*

⁶³ H. REP. NO. 2091, 80th Cong., 2d Sess. (1948).

⁶⁴ *Hoebee v. Howe*, 98 N.H. 168, —, 97 A.2d 223, 226 (1953).

held to be vicariously liable for his lessee through the use of the definitional statute.

*Hays v. Morgan*⁶⁵ was an action to recover damages for injuries sustained by the plaintiff when he was struck and injured by an airplane owned by defendants and being used to spray cotton on a farm where plaintiff was employed.⁶⁶ The Mississippi Code contained a provision almost identical to section 1301(26) of the Federal Aviation Act of 1958.⁶⁷ The Fifth Circuit held that the statute was intended to protect the public from negligence and financial irresponsibility of pilots. The risk of being hit did not rest with the one on the ground, but on the "owner who authorizes the use of his airplane."⁶⁸

The court did not refer to the legislative history, but found the "intent to include owners evident on the face of the statute."⁶⁹

The plaintiff in *Lamasters v. Snodgrass*⁷⁰ was a passenger who was injured because the lessee-pilot was negligent. The plaintiff brought suit against the owner of the aircraft under an Iowa statute identical to section 1301(26) of the Federal Aviation Act.⁷¹ Like the *Hoebee* court, the Supreme Court of Iowa supported its holding in *Lamasters* with the language of *House Report 2091*.⁷² The court placed great reliance on the decisions in *Hoebee* and *Hays*⁷³ in concluding that the recent amendment by the legislature dispelled any doubts which may have existed originally regarding the extension of liability to the owner of an airplane for the negligent acts of his lessee.⁷⁴ The court stated that "the legislature by the language [of the statute] . . . fixes civil responsibility on the owner, even though he was not in actual control, for the negligent conduct of one to whom he entrusted his airplane."⁷⁵

⁶⁵ 221 F.2d 481 (5th Cir. 1955).

⁶⁶ *Id.*

⁶⁷ *Id.* at 482.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 85 N.W.2d 622 (Iowa 1957).

⁷¹ *Id.* at 624.

⁷² *Id.* Civil Aircraft—Liability of Owner, H. REP. No. 2091, 80th Cong., 2d Sess. (1948).

⁷³ *Lamasters v. Snodgrass*, 85 N.W.2d 672, 625 (Iowa 1957).

⁷⁴ *Id.* at 626.

⁷⁵ *Id.*

The construction given to section 1301(26) of the Federal Aviation Act and identical state statutes by the courts in *Hoebee*, *Hays*, and *Lamasters* does not appear to represent the current trend in the judicial construction of these definitional statutes. Most of the recent decisions attack the reasoning in the *Hoebee-Hays-Lamaster* trilogy as faulty.⁷⁶

The first in a group of recent cases holding contra to *Hoebee-Hays-Lamasters* was *Rosdail v. Western Aviation*.⁷⁷ *Rosdail* concerned an action against a lessor of an aircraft for injuries sustained by two passengers and for the death of a third passenger in a crash of the leased aircraft.⁷⁸ Plaintiffs brought suit under the Federal Aviation Act, basing their cause of action on section 1301(26) of the Act, the same type statute construed in *Hoebee-Hays-Lamasters*.

The district court found that section 1301(26) of the Act did not establish, either expressly or impliedly, a civil remedy that would impute a pilot's negligent operation of an aircraft to the aircraft owner or lessor and did not alter common law principles to impose such liability.⁷⁹ Concerning the creation of a federal right of action, the court found that traditionally the states have provided the forums for suits in torts and have determined the standards of care, defenses to actions in tort, and procedural problems involved in the prosecution of a suit.⁸⁰ In the past the states have handled this task satisfactorily.⁸¹ The court stated that:

Were we to imply a private cause of action from the Federal Aviation Program, the federal courts would be obliged to fashion a body of federal tort common law. In the absence of compelling reasons such as a course is unwise . . . [W]e find no compelling reason to create a civil remedy for damages from the definitional section of the Federal Aviation Program, § 1301(26).⁸²

The court did not accept plaintiff's proposition that Congress intended to alter tort law principles in section 1301(26). It found

⁷⁶ See discussion *infra*, notes 77-98.

⁷⁷ 297 F. Supp. 681 (D. Colo. 1969).

⁷⁸ *Id.* at 681.

⁷⁹ *Id.* at 687.

⁸⁰ *Id.* at 683.

⁸¹ *Id.*

⁸² *Id.*

instead that Congress did not intend to alter common law principles of tort liability with a definitional section designed to regulate licensing, inspection, and registration of aircraft and airmen because there was no provision for application to tort liability. In fact, the section provides that nothing in the program shall abridge or alter the remedies now existing at common law or by statute.⁸³ *House Report No. 2091*, so extensively relied on by the *Hoebee-Hays-Lamasters* courts, was held by the *Rosdail* court not to support plaintiff's argument that Congress had intended to alter common law tort liability because it was clear from the *Report* that the purpose of the proposed amendment was to encourage the financing of new aircraft by removing the possibility of liability for damages caused by the aircraft.⁸⁴

The *Rosdail* court chose not to follow the reasoning in *Hoebee*, *Hays* and *Lamasters* for several reasons. First, these cases place significant reliance on *House Report No. 2091* as indicating that Congress intended section 1301(26) apply to common law suits to impute liability to the bailor and such reliance is unfounded. Secondly, the federal court in *Hays* did not have before it the question of imputing negligence by means of section 1301(26) and the two state courts (*Hoebee* and *Lamasters*) were likewise interpreting state statutes and only spoke in dicta with respect to imputing negligence under section 1301(26) of the Federal Aviation Act. Finally, there is express or implied language in all three cases that the imputation of negligence by section 1301(26) must be accompanied by an implication of a civil remedy from the Federal Aviation Act.⁸⁵

A case similar to *Rosdail*, *Rogers v. Ray Gardner Flying Service*,⁸⁶ involved a suit for damages for the wrongful deaths of the passengers of a private plane which was rented to the pilot prior to the time of the crash.⁸⁷ The plaintiffs asserted that by operation of section 1301(26) of the Federal Aviation Act, the defendant-lessor became vicariously liable for the negligence of the pilot. To support this contention, plaintiffs cited section 1404 of the Federal

⁸³ *Id.* at 685.

⁸⁴ *Id.* See note 63 *supra*.

⁸⁵ *Rosdail v. Western Aviation, Inc.*, 297 F. Supp. 681, 683 (D. Colo. 1969).

⁸⁶ 435 F.2d 1389 (5th Cir. 1970).

⁸⁷ *Id.* at 1389.

Aviation Act⁸⁸ as evidence that Congress purposefully considered the question of pre-empting state laws on bailment of airplanes and concluded that only those persons exempted by section 1404 should not be held liable as operators. Section 1404 is an enactment of the type of amendment proposed in *House Report No. 2091* and relied on in *Hoebee-Hays-Lamasters*. The Fifth Circuit did not find such was the intent of Congress, concluding that if Congress intended pre-emption in this area, it was capable of making that intent clear.⁸⁹

Like the *Rosdail* court, the *Rogers* court distinguished *Hoebee-Hays-Lamasters* on the grounds that none of these courts specifically dealt with section 1301(26), but were interpreting nearly identical state statutes.⁹⁰ The plaintiff was thus mistaken in relying on these three cases.⁹¹ The court appeared however, to be less than forthright in trying to avoid the inconsistency of its prior decision in *Hays*. *Hays* was based on a state statute taken verbatim from the Federal Aviation Act and the same types of arguments were used in both cases. In reality, it should make no difference that one was a state statute and one was federal. It appears that the court was trying to correct its earlier decision without overruling *Hays*.

*McCord v. Dixie Aviation Corporation*⁹² involved a suit against the owner-lessors of an airplane by passengers injured in a crash

⁸⁸ 49 U.S.C. § 1404:

No person having a security interest in, or security title to, any civil aircraft, aircraft engine, or propeller under a contract of conditional sale, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft, aircraft engine, or propeller under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft, aircraft engine, or propeller so leased, for any injury to or death of persons, or damage to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft, aircraft engine, or propeller, or by the ascent, descent, or flight of such aircraft, aircraft engine, or propeller, or by the dropping or falling of an object therefrom, unless such aircraft, aircraft engine, or propeller is in the actual possession or control of such person at the time of such injury, death, damage, or loss.

⁸⁹ *Rogers v. Ray Gardner Flying Service, Inc.*, 435 F.2d 1389, 1393 (5th Cir. 1970).

⁹⁰ See notes 54 and 66 *supra*.

⁹¹ *Rogers v. Ray Gardner Flying Service, Inc.*, 435 F.2d 1389, 1394 (5th Cir. 1970).

⁹² 450 F.2d 1129 (10th Cir. 1971).

allegedly caused by the negligence of the pilot. Like the plaintiffs in *Rosdail* and *Rogers*, the plaintiff here argued that by virtue of section 1301(26) the negligence of the pilot should be imputed to the owners-lessors as a matter of law.⁹³ The *McCord* court rejected the rationale of *Hoebec*⁹⁴ and further found, relying on *Rogers*, that no merit existed in plaintiff's argument that Congress, by failing to exempt specifically owners and lessors in section 1404 of the Act, intended that they be absolutely liable for injuries sustained by passengers of leased aircraft.⁹⁵

The plaintiffs in *McCord* also made a public policy argument based on the "deep pockets" theory, contending if the court did not imply a civil remedy under section 1301(26) of the Act, the victim might go remediless.⁹⁶ They asserted that the owner, rather than the pilot, would in most cases have the "deeper pocket" and "as a matter of public policy, it would be convenient, logical and consistently evenhanded to impute negligence to the fixed base operator."⁹⁷ The Tenth Circuit, however, found that the purpose of the Act was to regulate licensing, inspection and registration of aircraft and pilots. Absent a showing of compelling federal interest, the court concluded that to imply such a remedy would constitute judicial law making.⁹⁸

A summary of the statutes discussed above clearly indicates deficiencies in their scope and/or operation. While those statutes discussed under Section A have a broad reach and include all lessors as defendants, they have an inherent weakness in the coverage of plaintiffs. Only persons or property located on the surface of land or water at the time of the accident may be compensated. Those unfortunate enough to be passengers in the ill-fated aircraft would be unable to proceed against the owner-lessor.

The deficiency in scope of coverage of plaintiffs under Section A statutes likewise pervades those statutes under Section B. Under Section B, however, the operation of the statutes creates absolute liability on the part of the owner-lessor, not merely a rebuttable

⁹³ *Id.* at 1130.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1131.

⁹⁷ *Id.*

⁹⁸ *Id.*

<i>Type of Statute</i>	<i>Scope—Plaintiffs</i>	<i>Operation</i>	<i>Scope—Defendants</i>
SECTION A	injuries to person and property on land	creates prima facie liability	includes all owners and lessors
SECTION B (1)	injuries to person and property on land	absolute liability	includes all lessors and owners
B (2)			does not include lessors
SECTION C	injuries to person and property including passengers	absolute liability	lessor not included if lease greater than 30 days
SECTION D	injuries to person and property including passengers	plaintiff must show negligence on the part of the pilot	includes all owners and lessors
SECTION E*	injuries to person and property including passengers	plaintiff must show negligence on the part of the pilot	includes all owners and lessors

* Assuming of course that section 1301(26) or a corresponding state statute does create vicarious liability on the part of the lessor-owner as held by the courts in *Hayes*, *Hoebbe*, and *Lamasters*.

presumption as in the statutes under Section A. Those statutes under Section B(2) do not include lessors as owners.

The statute under Section C is probably the most favorable to the plaintiffs. Anyone injured may recover under this statute because it imposes absolute liability on the lessor. The scope of defendants included is somewhat restricted, however, by the requirement that the term of the lease be less than thirty days.

The only weakness evident on the face of Section D statutes is the requirement of a showing of negligence. In many cases where there are no eyewitnesses, this showing may be a formidable task although modern technology employed in accident investigation⁹⁹ as well as the acceptance of the doctrine of *res ipsa loquitur* by many courts have eased this burden somewhat.¹⁰⁰

⁹⁹ Sales, *Discovery Problems in Aviation Litigation*, 38 J. AIR L. & COM. 297 (1972).

¹⁰⁰ Comment, *Res Ipsa Loquitur In Small Aircraft Litigation*, 41 J. AIR L. & COM. 103 (1975).

Perhaps the most tenuous of all the statutes discussed are those definitional statutes under Section E. While they have been accepted by some courts interpreting them as state statutes,¹⁰¹ attempts by plaintiffs to impose liability under the federal statute have been rejected almost universally,¹⁰² and the current trend seems to reject their application as state statutes also.¹⁰³ Most of the decisions finding liability under these statutes came in the 1950's while those rejecting such an extension of vicarious liability are fairly recent. Additionally, the grounds upon which the earlier decisions were founded have been rejected in later decisions as erroneous. In light of these facts, future successful imposition of vicarious liability through the definitional statutes appears questionable.

The critical weakness characteristic of each of these statutes is the problem of solvency. No matter how much liability the statutes may create, if the defendant is uninsured and insolvent, the plaintiff will go remediless. While these statutes have gone far in attempting to bring a solvent defendant into the picture, they only go half of the way. Additional measures are needed to insure that the owner-lessor is solvent.

The Fifth Circuit in *Hays* looked to the motor vehicle statutes in fashioning its remedy.¹⁰⁴ The enterprise of motor vehicle leasing had earlier success than aircraft leasing, and, consequently, more legislation has been passed to regulate this activity. This field should be examined as a bridge over the gaps left by the statutes previously discussed.

FINANCIAL RESPONSIBILITY LAWS— THE ANSWER?

The development of lessor liability in motor vehicle leasing has followed a similar course to that of aircraft leasing. The general rule is that in the absence of a statute imposing liability, the owner of a motor vehicle is not liable to strangers for injuries oc-

¹⁰¹ See discussion *infra*, notes 59-75.

¹⁰² See discussion *supra*, notes 76-97. Cf. *Sosa v. Young Flying Service*, 277 F. Supp. 554 (S.D. Tex. 1967).

¹⁰³ *Guillen v. Williams*, 27 Misc. 2d 575, 212 N.Y.S.2d 556 (1961); *Ferrari v. Byerly Aviation, Inc.*, 131 Ill. App. 2d 747, 268 N.E.2d 558 (1971).

¹⁰⁴ *Hays v. Morgan*, 221 F.2d 481, 482 (5th Cir. 1955).

curing from the negligent use of the automobile by one to whom it has been lent or hired.¹⁰⁵

The common law rule has been modified in a number of states by statute or judicial decision.¹⁰⁶ Some states have enacted statutes similar to those discussed earlier in the aviation area. Most provide that a lessor of a motor vehicle shall be jointly and severally liable with the lessee for the damages caused by the negligence of the lessee.¹⁰⁷ Florida has imposed vicarious liability on the lessors of

¹⁰⁵ *Cruse-Crawford Mfg. Co. v. Rucker*, 220 Ala. 101, 123 So. 897 (1929); *Schneider v. McAleer*, 39 Ariz. 190, 4 P.2d 903 (1931); *White v. Sims*, 211 Ark. 499, 201 S.W.2d 21 (1947); *Weber v. Pinyan*, 9 Cal. 2d 226, 70 P.2d 183 (1937); *Sawyer v. Blanchard*, 126 Colo. 485, 251 P.2d 434 (1952); *Nash v. Holzbeierlein & Sons*, 68 A.2d 403 (D.C. Mun. App. 1949); *Engleman v. Traeger*, 102 Fla. 756, 136 So. 527 (1931); *Lewis v. Amorous*, 3 Ga. App. 50, 59 S.E. 338 (1907); *White v. Seitz*, 342 Ill. 266, 174 N.E. 371 (1931); *Hunter v. Irwin*, 220 Iowa 693, 263 N.W. 34 (1935); *Halverson v. Blosser*, 101 Kan. 683, 168 P. 863 (1917); *American Fidelity & Cas. Co. v. Pennsylvania Cas. Co.*, 258 S.W.2d 5 (Ky. 1953); *Martin v. Mud Supply Co.*, 239 La. 616, 119 So. 2d 484 (1959); *Phillips v. Gookin*, 231 Mass. 250, 120 N.E. 691 (1918); *Martin v. Schiska*, 183 Minn. 256, 236 N.W. 312 (1931); *Bourgeois v. Mississippi School Supply Co.*, 170 Miss. 310, 155 So. 209 (1934); *Reis v. Gentry*, 87 S.W.2d 1037 (Mo. 1935); *Snyder v. Russell*, 140 Neb. 616, 1 N.W.2d 125 (1941); *Wilkins v. Page*, 91 N.H. 409, 20 A.2d 647 (1941); *Ruchlin v. A. G. Motor Sales Corp.*, 127 N.J.L. 378, 22 A.2d 767 (1941); *Cherwien v. Geiter*, 272 N.Y. 165, 5 N.E.2d 185 (1936); *Tyson v. Frutchev*, 194 N.C. 750, 140 S.E. 718 (1927); *Posey v. Krogh*, 65 N.D. 490, 259 N.W. 757 (1935); *Osber v. Yeggerman*, 38 Ohio App. 498, 176 N.E. 123 (1930); *Randolph v. Schuth*, 185 Okl. 204, 90 P.2d 880 (1939); *Kantola v. Lovell Auto Co.*, 157 Ore. 534, 72 P.2d 61 (1937); *Gemma v. Rotonondo*, 62 R.I. 293, 5 A.2d 297 (1939); *East Tennessee & Western North Carolina Motor Transp. Co. v. Brooks*, 173 Tenn. 542, 121 S.W.2d 559 (1938); *Ortiz v. Echols*, 131 S.W.2d 142 (Tex. Civ. App.—San Antonio 1939, writ dism'd jud. cor.); *Green's Ex'rs v. Smith*, 146 Va. 442, 131 S.E. 846 (1926); *Canonzeri v. Heckert*, 223 Wis. 25, 269 N.W. 716 (1936).

¹⁰⁶ CONN. REV. GEN. STAT. § 14-154a (1975); ME. REV. STAT. ANN. tit. 29, § 1862 (1965); NEV. REV. STAT. § 482.305 (1975); N.Y. VEH. & TRAF. LAW § 388 (McKinney 1970).

¹⁰⁷ See note 106 *supra*. Various reasons have been cited for the modification of the rule. Some are:

Driverless Car Co. v. Armstrong, 14 P.2d 1098, 1100 (Col. 1932). Here the court stated that:

We do not think that the legislature acted unreasonably in imposing upon driverless car owners alone the requirements found in the challenged provisions of the act. Such provisions were enacted in the exercise of the police power in an effort to secure safety for person and property by regulating the use of the public streets and highways. The Legislature may well have believed that one who has no pecuniary interest in the automobile he drives has less inducement to drive carefully upon the public thoroughfares, and is more likely to become a menace to person and property than one who has such a pecuniary interest.

motor vehicles through the use of the outdated "dangerous instrumentality" doctrine.¹⁰⁸ This doctrine rests on the theory that since an owner is required to license his automobile, an operator in lawful possession with the owner's consent in effect operates it under the authority of the license of the owner and for the benefit of the owner. The operator is by fiction made the agent of the owner. This fictional theory has been rejected by a sizable majority of the states.

The same gap, however, exists here that existed under the aviation statutes. An act may bring in additional defendants to "deepen the pocket," but if the additional defendants are insolvent, the result is the same as if there were no statute. Some states have bridged this "solvency gap" through the promulgation of special statutes requiring the lessor to provide insurance for the renter against liability arising out of the renter's negligence before the cars can be registered and used for leasing or the owner-lessor be given a license to operate the enterprise.¹⁰⁹ Other states have accomplished substantially the same result through the use of general motor vehicle financial laws.¹¹⁰ Nearly every state and also the Dis-

Levy v. Daniels' U-Drive Auto Rental Co., Inc., 143 A. 163, 164 (Conn. 1928):

The purpose of the statute was not primarily to give the injured person a right of recovery against the tortious operator of the car, but to protect the safety of the traffic upon highways by providing an incentive to him who rented motor vehicles to rent them to competent and careful operators by making him liable for damages resulting from the tortious operation of the rented vehicles.

See also Reeves v. Wright & Taylor, 370 Ky. 470, 220 S.W.2d 1007, 1008 (1949).
Hodge Drive-It-Yourself Co. v. City of Cincinnati, 123 Ohio St. 284, ___, 175 N.E. 196, 199 (1931).

Concededly, the automobiles are rented on a mileage basis and for operation over the public streets; so that for every mile of travel for which a rental fee is exacted of the lessee a mile of public street has been used in earning such rental fee, and, while the use of the public streets by the lessee has been a use of such streets by a member of the public in the ordinary way, such use by the lessor has been a use for his own gain, just as the use of the streets by street cars, buses and taxicabs is a use by them for their own gain.

¹⁰⁸ Hertz Corp. v. Hellens, 140 So.2d 73 (Fla. 1962).

¹⁰⁹ CONN. REV. GEN. STAT. § 14-15 (1975); DEL. CODE ANN. tit. 21, § 6102 (1975); GA. CODE ANN. § 92A-621 (1975); KY. REV. STAT. ANN. § 281.655 (1971); MASS. LAWS ANN. ch. 90, § 32E (1975); N.C. GEN. STAT. § 20-281 (1975); OKL. STAT. ANN. tit. 47, § 8-101 (1962); R.I. GEN. LAWS § 31-34-1 (1956); S. D. COMPILED LAWS § 58-23-4 (Supp. 1975); VA. CODE ANN. § 46.1-14 (1950); WIS. STAT. ANN. § 344.51 (1971).

¹¹⁰ ALA. CODE tit. 36, §§ 74(42)-74(83) (1958); ALAS. STAT. §§ 28-20.010-

tract of Columbia have adopted some form of financial responsibility law.¹¹¹ The scope of these statutes is broad enough, in the absence of a more specific statute, to cover motor vehicle leasing. Most of these statutes define "owner" to include the lessor, subjecting him therefore to the operation of the statute.¹¹² One difference exists in the operation of the general financial responsibility statutes and those specifically applicable to lessors. Whereas the specific statutes require a showing of proof of liability insurance *prior* to registration and licensing of the vehicles, the general statutes do not require a showing of financial responsibility or proof of liability insurance until *after* the accident.¹¹³ Should a person be required to furnish proof of financial responsibility and be unable, or neglect or refuse to furnish security, his drivers license and the license of every motor vehicle owned by him may be sus-

28-20.640 (1962); ARIZ. REV. STAT. §§ 28-1101-28-1225 (1956); ARK. STAT. ANN. §§ 75-1401-75-1492 (1947); CAL. VEH. CODE §§ 16000-16503 (Deering 1971); COLO. REV. STAT. ANN. §§ 42-7-101 *et seq.* (1973); CONN. REV. GEN. STAT. §§ 14-111-14-144 (1975); DEL. CODE ANN. tit. 21, §§ 2901-2972 (1974); D.C. CODE ANN. §§ 40-417-40-498c (1973); FLA. STAT. ANN. §§ 324.011-324.251 (1975); GA. CODE ANN. §§ 92A-601-92A-621 (1975); HAW. REV. STAT. §§ 287-1-287-48 (1968); IDAHO CODE ANN. §§ 49-1501-49-1540 (1947); ILL. REV. STAT. ch. 95½, §§ 7-101-7-502 (1971); IND. ANN. STAT. §§ 9-2-1-1-9-2-1-45 (1971); IOWA CODE §§ 321A.1-321A.39 (1966); KAN. STAT. ANN. §§ 40-3101-40-3121 (1975); KY. REV. STAT. §§ 187.290-187.990 (1950); LA. REV. STAT. §§ 32:851-32:1043 (1963); ME. REV. STAT. tit. 29, §§ 781-88 (1964); MD. ANN. CODE art. 66½, §§ 7-101-7-635 (1957); MICH. COMP. LAWS §§ 257.501-257.532 (1948); MINN. STAT. ANN. §§ 170.21-170.58 (1960); MISS. CODE ANN. §§ 64-15-1-64-15-75 (1972); MONT. REV. STAT. §§ 53-418-53-458 (1947); MO. REV. STAT. §§ 303.010-303.370 (1959); NEB. REV. STAT. §§ 60-501-60-569 (1943); N.H. REV. STAT. ANN. §§ 268:1-268:27 (1966); NEV. REV. STAT. §§ 485.010-485.420 (1957); N.J. REV. STAT. ANN. §§ 39:6-23-39:6-104 (1973); N.M. STAT. ANN. §§ 64-24-42-64-24-107 (1953); N.Y. VEH. & TRAF. LAW §§ 330-368 (McKinney 1970); N.C. GEN. STAT. §§ 20-279.1-20-279.39 (1975); N.D. CENTURY CODE §§ 39-16-01-39-16-37 (1972); OHIO REV. CODE ANN. §§ 4509.1-4509.99 (1973); OKL. STAT. ANN. tit. 47, §§ 7-101-7-505 (1962); ORE. REV. STAT. §§ 486.011-486.991 (1975); PA. STAT. ANN. tit. 75, §§ 1401-1436 (Purdon's 1971); R.I. GEN. LAWS ANN. §§ 31-31-1-31-34-6 (1956); S.C. CODE ANN. §§ 46-701-46-750.28 (1962); S.D. COMP. LAWS §§ 32-35-1-32-35-112 (1967); TENN. CODE ANN. §§ 59-1201-59-1240 (1968); TEX. REV. CIV. STAT. ANN. art. 6701h (1969); UTAH CODE ANN. §§ 41-12-1-41-12-41 (1953); VA. CODE ANN. §§ 46.1-388-46.1-514 (1950); VT. STAT. ANN. tit. 23, §§ 801-921 (1967); WASH. REV. CODE §§ 46.29.010-46.29.625 (1970); W. VA. CODE ANN. §§ 17D-4-1-17D-4-20 (1974); WIS. STAT. §§ 344.01-344.52 (1971); WYO. STAT. ANN. §§ 31-277-31-315.4 (1957).

¹¹¹ See note 110 *supra*.

¹¹² See, e.g., *Rouse v. Greyhound Rent-A-Car, Inc.*, 506 F.2d 410 (5th Cir. 1975).

¹¹³ See generally, note 110.

pended.¹¹⁴ Though perhaps not incentive for the average driver, the threat of suspension of the license of every motor vehicle owned by a lessor should in reality make liability insurance or some form of indemnity protection compulsory to the prudent businessman engaged in motor vehicle leasing.

These statutes do not purport to create vicarious liability in which payment is automatic without regard to negligence. They only increase the probability that if the persons covered by the statute cause damage and are found to be liable, the plaintiff will be compensated. These statutes have the effect, however, of creating vicarious liability because they force the lessor-owner to insure against the negligent acts of the lessee-renter. The result to the plaintiff is the same. Instead of the lessor insuring himself for the negligent acts of the renter for fear that he will be held liable under a vicarious liability statute, he is now insuring the lessee for his own conduct and negligent acts. In either instance the net effect is to guarantee the plaintiff a fund to recover, if the defendant is found liable. Under many vicarious liability statutes the plaintiff proves negligence on the part of the renter, then by statute imputes that negligence to the lessor so that he may recover from the lessor. Under the financial responsibility laws, the plaintiff proves negligence on the part of the renter and recovers from a fund provided by the lessor. Either way, the result is substantially the same. Assuming the propriety of the "deep pockets" theory, it would seem more logical to discard the fictions associated with the vicarious liability statutes (the owner-lessor is not negligent but the renter is) and to have a tort compensation system which is an embodiment of the "deep pockets" theory. When the owner-lessor is not negligent, but there is an injured plaintiff in need of compensation, the law places this burden on the owner-lessor since he is in the best position to provide compensation.

A number of aircraft financial responsibility acts have been promulgated by various states.¹¹⁵ Most of these statutes are patterned after the Uniform Aircraft Financial Responsibility Act. These

¹¹⁴ See, e.g., IND. ANN. STAT. § 9-2-1-4 (1971).

¹¹⁵ CONN. GEN. STAT. REV. §§ 15-102 - 15-120 (1975); ILL. REV. STAT. ch. 15½, §§ 22.42a - 22.42o (1971); MASS. GEN. LAWS. ANN. ch. 90, §§ 49B-49R (1975); MICH. COMP. LAWS §§ 259.671 - 259.692 (1948); N.H. REV. STAT. ANN. §§ 422-A:1 - 422-A:23 (1966); IND. ANN. STAT. §§ 8-21-3-1 - 8-21-3-23 (1971).

acts are not directed at lessors specifically as were some of the statutes in the preceding section,¹¹⁶ yet their scope is broad enough to encompass the lessor.¹¹⁷ Their operation is similar to the general motor vehicle financial responsibility acts. For example, the statute adopted by Connecticut provides that within thirty days after the receipt of an accident report, the commissioner of transportation will enter an order setting the amount of security he deems necessary to satisfy any judgment for damages resulting from the accident.¹¹⁸ The owner and operator of the aircraft have thirty days to deposit the specified amount of security with the commissioner.¹¹⁹ Upon failure to provide the requisite security, the commissioner then shall suspend the operating privilege of the owner—and of all his aircraft—and the operating privilege of the operator.¹²⁰ A deposit is not required if the owner had insured the aircraft involved in the accident and the policy was in effect at the time of the accident.¹²¹

These statutes have the effect of requiring compulsory liability insurance or some other form of indemnity protection on the part of aircraft lessors. If the lessor is unable to furnish the security required by the commissioner's order, he risks losing his license to operate the specific aircraft involved in the accident as well as the operating privilege of all aircraft owned by him. Such threat should furnish incentive to require the prudent businessman to purchase liability insurance to avoid the requirements as to security and the threat of suspension.¹²²

With the exception of Indiana none of the states exempt passengers of the aircraft from coverage.¹²³ The coverage of persons and property is at a maximum, with only damage to "property owned by the owner or operator or in his care, custody or control or carried in or on the aircraft"¹²⁴ excluded.

¹¹⁶ See note 109 *supra*.

¹¹⁷ See, e.g., CONN. GEN. STAT. REV. § 15-102(d) (1975); Allegheny Airlines, Inc. v. United States, 504 F.2d 104, 114 (7th Cir. 1974).

¹¹⁸ CONN. GEN. STAT. REV. § 15-105(a)(i).

¹¹⁹ *Id.* at § 15-105(b).

¹²⁰ *Id.*

¹²¹ *Id.* at § 15-105(c)(4).

¹²² *Id.*

¹²³ IND. ANN. STAT. § 8-21-3-4 (1971).

¹²⁴ See, e.g., CONN. GEN. STAT. REV. § 15-104(a) (1975).

Two states have chosen not to adopt the Uniform Aircraft Responsibility Act and have instead promulgated statutes of their own to cover leasing. Virginia has adopted a statute requiring proof of financial responsibility *prior* to the licensing of the aircraft rather than *after* the accident, as required by the Uniform Aircraft Financial Responsibility Act.¹²⁵ This statute applies to all aircraft involved in general aviation, not just those used for leasing.

Maryland has promulgated a financial responsibility statute specifically for rental aircraft.¹²⁶ This statute provides that:

No person shall rent or lease any aircraft to a renter-pilot unless there is a policy of insurance in force on the aircraft covering claims by passengers or other persons for injuries to them or damage to their property arising out of the aircraft. (commonly called liability insurance)¹²⁷

Proof of insurance is required annually at the time of the registration of the aircraft.¹²⁸

The Maryland statute represents the optimum solution to financial responsibility in aircraft leasing and rental. First, the legislature has recognized that aircraft leasing has problems unique from general aviation just as many states have treated motor vehicle rental separately from general traffic.¹²⁹ The broad scope of the statute specifically permits recovery by passengers, as well as persons on the surface of land or in water, in its operation.¹³⁰ Proof of insurance is required prior to registration rather than after the accident as in the Uniform Financial Responsibility Act. The relatively high limits of coverage mean the minimum amount of insurance required by the lessor is sufficient to provide adequate compensation to an injured plaintiff.¹³¹

The financial responsibility laws have the same effect as those applicable to motor vehicles. By requiring that the lessor in-

¹²⁵ VA. CODE ANN. § 5.1-88.1 (1950).

¹²⁶ MD. ANN. CODE art. 1A § 3-305 (1957).

¹²⁷ *Id.* at § 3-305(a).

¹²⁸ *Id.* at § 3-305(c).

¹²⁹ See note 106 *supra*.

¹³⁰ MD. ANN. CODE art. 1A § 3-305(a) (1957).

¹³¹ *Id.* at § 3-305(b).

The "liability insurance" shall be in the amount of not less than \$50,000 bodily injury per person, \$100,000 per accident, and \$50,000 physical damage protection.

sure against the renter's negligence, the same effect is reached as if a vicarious liability statute were in operation. As previously discussed, these financial responsibility laws do not purport to impose *per se* vicarious liability. But, by requiring that the lessor insure the renter against his own negligence, the same result is reached as if the plaintiff made out his case of negligence against the renter, by statute had imputed the negligence to the lessor, and then collected from the lessor.

CONCLUSION

Two basic approaches have been used by the states to impose the effects of vicarious liability on those renting aircraft. The first method is a "direct" approach. The legislatures have promulgated statutes making a lessor jointly and severally liable with his lessee for the damage inflicted by the negligent acts of the lessee. The second method is a "indirect" approach, requiring the lessor to insure or obtain some form of indemnity or insurance for any damage inflicted by the operation of the aircraft leased by him.

Those "direct" statutes are inherently flawed because many limit the scope of persons who may recover by specifically excluding passengers. Moreover, even if the plaintiff and defendant are within the scope of the statute, and the plaintiff shows negligence on the part of the defendant (assuming a showing of negligence is required), the plaintiff may go remediless if the defendant is insolvent and not covered by liability insurance. Creation of vicarious liability by statute will be of no use to an injured plaintiff unless he can actually recover.

On the other hand, the "indirect" or financial responsibility approach bridges the gaps left by the statutes imposing vicarious liability because lessors are included in all statutes and passengers are entitled to recover in every state except Indiana. Once in operation these statutes have a vicarious liability effect. Moreover, the solvency gap existing in the vicarious liability statutes has been alleviated to a large extent.

With the ever increasing popularity of general aviation, the demand for rental aircraft is likely to increase. This increase will provide added incentive to establish a more predictable scheme of obtaining compensation for plaintiffs who are injured by careless

and incompetent renters. Vicarious liability now appears to be a fact of life. The Maryland statute represents the better solution to the problem of compensating the injured plaintiff than any of the other vicarious liability statutes or other financial responsibility acts. Its coverage is broad, a characteristic lacking in most vicarious liability statutes. It requires proof of financial responsibility *prior* to registration of the aircraft rather than *after* the accident, a weakness in the Uniform Aircraft Financial Responsibility Act. The fund from which recovery is to be made is assured in nearly every case. These factors would indeed make Maryland the leader in the search for newer and better means of adequately compensating persons injured by the reckless operation of aircraft by lessees.